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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1653

VIRGIL HAYES, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case was published March 30, 1971, and is reported in ____ F.2d ____. It is captioned *United States of America, Appellee* v. *Virgil Hayes, Jr., Appellant.* A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The decision sought to be reviewed, *Virgil Hayes* v. *United States of America*, Number 30795, United States Court of Appeals for the Fifth Circuit, is dated March 30, 1971. The decision affirmed the judgment of the United States District Court for the Northern District of Georgia *per curiam* and has not yet been published in the official reports.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under and by virtue of Title 18, U.S.C. 3772, within the time provided by Rule 22(2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law of gravity and importance in the administration of criminal justice which has not been, but should be, settled by this Court. Petitioner contends that the Court of Appeals has misconstrued and applied statutory provisions respecting the application of legal principles, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTION PRESENTED FOR REVIEW

Is evidence of possession of "nontaxpaid whiskey" and whiskey, the containers of which did not have "tax stamps" affixed, sufficient to establish guilt of possession of distilled spirits in violation of Title 26, Sections 5205(a)(2) and 5604(a)(1)?

(d)

STATUTES INVOLVED

Title 26, Section 5205(a)(2), United States Code:

"No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. . . ."

Title 26, Section 5604(a)(1), United States Code:

"Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section . . . shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, for each such offense."

(e)

STATEMENT OF THE CASE

Petitioner was jointly indicted with others on several counts charging violations of the Internal Revenue Laws relating to distilled spirits. Relevant here are Counts 1 and 5 which charged that on specified dates he possessed described quantities of distilled spirits the immediate containers of which did not have affixed thereto stamps evidencing the determination of the tax on said distilled spirits, or indicating compliance with the provisions of Chapter 51 of the Internal Revenue Code. He was convicted after trial by a jury and was sentenced to serve four years imprisonment. The judgment was affirmed on appeal.

The evidence introduced at the trial to prove the guilt of Petitioner respecting the charge of possessing such dis-

tilled spirits related to the possession of "non-tax paid whiskey" the containers of which did not have "tax stamps" affixed thereto. It would serve no useful purpose here to detail the evidence, but should be sufficient to state that the evidence as to each of the two counts here involved indicated that on two occasions Petitioner sold a total of 48 gallons of "non-tax paid whiskey" which did not have "tax stamps" affixed to the containers to an undercover agent.

There was no evidence that such whiskey was in fact distilled spirits or that the immediate containers thereof did not have affixed thereto "stamps evidencing the determination of the tax on said distilled spirits, or indicating compliance with the provisions of" Chapter 51 of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

Since the Court of Appeals affirmed the judgment of the trial court without rendering a written opinion, except to state that the judgment is affirmed, we conclude that it was of the opinions that: (1) it is not necessary for the Government, under charges such as those involved here, to prove every essential element of the offense, viz: the absence of a stamp "evidencing the determination of the tax or indicating compliance with the provisions of" Chapter 51 of the Internal Revenue Code; or (2) the terms "non-tax paid whiskey" and "tax stamp" are definitive of the statutory terminology. In the absence of an opinion from that court, we must assume the latter premise. The statutes and the allegations of the indictment are specific; the evidence depended upon to sustain the charges is not.

Section 5205(a)(1) provides that every container of distilled spirits bottled in bond be stamped by a stamp evi-

dencing the bottling of such spirits in bond under the provisions of Section 5233 (26 U.S.C. 5233). The following section prohibits the possession of any distilled spirits, unless the immediate container thereof is stamped, *not* with a "tax stamp", but by a stamp which may evidence either: (1) a determination of the tax, or (2) compliance with the provisions of Chapter 51 of the Internal Revenue Code. It is significant that the requirement is not that the tax be paid or that the container bear a "tax stamp."

Accordingly, it is clear that "non-tax paid whiskey" is not descriptive of the statutory illicit or contraband distilled spirits. The term "tax stamp", by the same token, is not descriptive of "stamp evidencing a determination of the tax or indicating compliance" with the statutes.

The ruling of the Court of Appeals which overlooks the statutory requirements and equates a "determination of the tax" with payment of the tax is erroneous and frustrates the statutory scheme. The characterization of "non-tax paid whiskey", as shown by the evidence, wholly fails to meet the standard required by the statutes to establish criminal conduct. This being a criminal case, the evidence should be strictly construed and nothing left to implication or chance. As the record stands, the conviction is founded upon a construction of the relevant statutes which is clearly contrary to the unambiguous terms thereof.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for the writ of certiorari should be granted and that this Court should correct the error implicit in the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ROBERT B. THOMPSON
Attorney for Petitioner

P. O. Box 677
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Georgia 30501

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Virgil Hayes, Jr. were deposited in the United States Post Office with airmail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington, D. C., and to The Honorable John W. Stokes, Jr., United States Attorney, P. O. Box 912, Atlanta, Georgia.

This the 27th day of April, 1971.

ROBERT B. THOMPSON

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30795

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VIRGIL HAYES, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(March 30, 1971)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409.

1. See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30795

Summary Calendar

D. C. Docket No. CR-A-26010

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VIRGIL HAYES, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 30, 1971

Issued As Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1653

VIRGIL HAYES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the Northern District of Georgia, petitioner was convicted of unlawfully possessing non-taxpaid distilled spirits (26 U.S.C. 5205(a)(2) and 5604(a)(1)) and unlawfully carrying on the business of a retail liquor dealer without paying the special tax (26 U.S.C. 5691(a)). On October 26, 1970, he was given concurrent four-year prison sentences. The court of appeals affirmed without opinion (Pet. App.).

Petitioner here reasserts the claim advanced in the court of appeals that proof of possession of nontax-paid whiskey is not sufficient to establish guilt of possession of "distilled spirits". His contention is apparently that use of the term "nontaxpaid whiskey" at trial to describe the substance he possessed could not be construed as the equivalent of "distilled spirits" within the meaning of Sections 5205(a)(2) and 5604(a)(1).[1]

The contention is insubstantial. Under 26 U.S.C. 5002(a)(6), "distilled spirits" are defined as "that substance known as ethyl alcohol, ethanol, or spirits of wine, including all dilutions and mixtures thereof * * *." Notwithstanding the fact that the statutory term "distilled spirits" was not used at trial, it has been held that the terms "whiskey" or "liquor", used at the trial herein, are equivalent. *United States* v. *Bauguess*, 419 F. 2d 125 (C.A. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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[1] It should be noted that petitioner's contention does not undermine his conviction for carrying on the business of a retail liquor dealer, which fully supports his sentence.

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